Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-754

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

ROY MANDUJANO

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED DECEMBER 16, 1974
CERTIORARI GRANTED MARCH 24, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-754

UNITED STATES OF AMERICA,

Petitioner

—v.—

ROY MANDUJANO

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[1] The opinion of the court of appeals may be found in Petitioner's Appendix A, pp. 1A-20A.

The judgment of the court of appeals may be found in Petitioner's Appendix B, pp. 21A-22A.

The order of the court of appeals denying rehearing may be found in Petitioner's Appendix C, pp. 23A-24A.

The opinion of the district court may be found in Petitioner's Appendix D, pp. 25A-42A.

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RELEVANT DOCKET ENTRIES

June 13, 1973 —Indictment filed. Sealed.

* * * *

July 23, 1973 —Motion for Suppression of Testimony Before Grand Jury and Memorandum Brief filed.

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July 27, 1973 —Answer to Defendant's Pre-Trial Motions filed.

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August 24, 1973 —Hearing on all pending motions passed.

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August 28, 1973 —Hearing on Motions.

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September 4, 1973—Order on Motions filed.

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October 12, 1973 —Amended Opinion filed.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Crimina! No. ————

UNITED STATES OF AMERICA, PLAINTIFF

vs

ROY MANDUJANO, DEFENDANT

INDICTMENT

Vio: 21 USC § 846: Attempt to distribute heroin; 18 U.S.C. § 1623: False statement

THE GRAND JURY CHARGES:

COUNT ONE

[21 USC § 846]

On or about the 29th day of March, 1973, in the Western District of Texas, ROY MANDUJANO, the defendant herein, did knowingly and intentionally attempt to distribute one ounce of heroin, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1), all in violation of Title 21, United States Code, Section 846.

COUNT TWO

[18 USC § 1623]

1. That, on the 2nd day of May, 1973, in the Western District of Texas, ROY MANDUJANO, the defendant herein, under oath as a witness in a proceeding before a Grand Jury, duly impanelled and sworn in the United States District Court for the Western District of Texas and, inquiring in a matter then and there pending before

the said Grand Jury, did willfully and knowingly make a false material declaration, that is to say:

2. That, at the time and place aforesaid, the Grand Jury, inquiring as aforesaid, was conducting an investigation to determine whether there were violations of the narcotics, internal revenue or firearms laws of the United States and any other criminal statute of the United States.

3. That it was material to the aforesaid investigation to determine the nature and extent of any involvement in the trafficking of heroin by ROY MANDUJANO, the defendant herein.

4. At the time and place alleged in paragraph 1 herein, ROY MANDUJANO, the defendant herein, appeared before the aforesaid Grand Jury, and, while testifying under oath, made the following false declarations which he knew to be false and which were in respect to the aforesaid material matter:

"Q. Have you talked to anyone about selling heroin to them during the last year?
A. No, sir.
Q. And you have never told anyone that you would try to get heroin to sell to them?
A. No, sir.
Q. No one has ever given you any money . . .
A. No.
Q. . . . to go buy them heroin?
A. No, sir."

5. The aforesaid declarations of ROY MANDUJANO, the defendant herein, as he then and there well knew, were false in that:

ROY MANDUJANO, the defendant herein, had, on March 29, 1973;

(1) Had a discussion with an undercover officer of the Office for Drug Abuse Law Enforcement concerning the possibility of selling heroin to the said officer;

(2) Told the aforesaid undercover officer that he would attempt to get a quantity of heroin to sell to the said officer;
(3) Been given a sum of money by the aforesaid undercover officer for the purpose of purchasing heroin for the said officer.

All in violation of Title 18, United States Code, Section 1623.

A TRUE BILL:

_____

Foreman of the Grand Jury

WILLIAM S. SESSIONS
United States Attorney

By: _____
Assistant United States Attorney

TESTIMONY OF RESPONDENT BEFORE THE GRAND JURY

[2] WHEREUPON the said ROY MANDUJANO, having first been duly sworn, testified as follows:

EXAMINATION

QUESTIONS BY MR. LUCKEL:

Q Are you wearing prescription glasses?
A No, sir.
Q Would you please remove them?
A (Witness did as requested).
Q Okay. Thank you. Mr. Mandujano, my name is Eb Luckel. I'm a Special Attorney employed by the Department of Justice. The ladies and gentlemen that you see here today are members of a Special Federal [3] Grand Jury and this Grand Jury is looking into violations of various laws including narcotic laws, internal revenue laws and firearm laws. In fact, this Grand Jury is empowered to go into any criminal law violation it may learn about. You are here today because you have been served with a subpoena. When did you get that subpoena?
A Sir?
Q When did you receive the subpoena, the piece of paper that told you to be here?
A Oh, I think last week.
Q Early in the week?
A Last week, yes, sir.
Q Now, that subpoena, that's what we call that white piece of paper, that insures that you will be here today and this Grand Jury will be asking questions to you mainly through me but also some of the jurors may ask questions. Now, you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?
A Do I answer all the questions you ask?

Q You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear?

[4] A Yes, sir.

Q You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those truthfully, in other words if you lie about certain questions, you could possibly be charged with perjury. Do you understand that?

A Yes, sir.

Q Have you discussed your presence here with anybody?

A My wife.

Q Have you contacted a lawyer in this matter?

A No, sir, I haven't.

Q I take that to mean then that you do not wish the services of a lawyer here today?

A I don't have one. I don't have the money to get one.

Q Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know.

A Yes, sir.

Q Is that clear?

A (Nod affirmative).

[5] Q Now, Mr. Mandujano, we are planning to ask you questions today. We think you can give us information that will be helpful to the Grand Jury. Of course, we want your honest answers to all these questions. First of all, sir, where do you reside now?

A Well, I'm living with my uncle.

Q Where?

A With my uncle.

Q And what is the address?

A 2217 Guadalupe.

Q What is your uncle's name?

A Telesforo Mandujano.

Q Could you please spell that first name?

A F-o-r-r-o.

Q That's it?

A Yes, sir.

MEMEBR OF THE GRAND JURY: T-e-l-e-s-f-o-r-o.

QUESTIONS BY MR. LUCKEL:

Q Who lives there besides your uncle and you?

A Me and my wife.

Q What is her name?

A Elva.

Q Elva? And do you have any children?

A Yes, sir.

[6] Q Do they live there with you?

A No, sir.

Q Where do they live?

A With my mother.

Q Where does your mother live?

A 2171 Southwest 19th.

Q And how old are your children?

A Three years and four years.

Q Two children?

A Yes, sir.

Q And both of them live with your mother?

A Yes, sir.

Q Are you paying rent at your uncle's house?

A No, sir. I'm taking care of our boys. They live and sleep there.

Q Could you speak up?

A I'm taking care—I'm a bartender and I'm taking care of the place there and they don't charge me.

Q Whose place is that?

A My uncle and my brother.

Q Who is your brother.

A Thomas Mandujano.

Q And it is your brother and your uncle that own this place?

A Yes, sir.

[7] Q And where is that place?

A On Guadalupe street.

Q What address, please?

A 2217 Guadalupe.

Q 2270?
A Yes, sir.
Q And this is the address of the house or this is the address—
A Well, it is a bar.
Q It is a bar?
A Yes, sir.
Q Well, is there a room to live in also?
A No, sir.
Q Where do you live?
A Just inside. I just sleep there.
Q Same address?
A Yes, sir, same one.
Q And what work do you do at this place?
A I'm a bartender.
Q What is the name of it, by the way?
A Tally Ho and Foro's Lounge.
Q Tally Ho and what?
A Foro's Lounge.
Q Could you spell that last one?
A F-o-r-o. He doesn't have a name, but that's his name.
[8] They call it like that.
Q I see. Does he pay you a salary?
A Well, yes, sir.
Q How much?
A $60.
Q Every how often?
A Every week.
Q And out of this do you pay rent—
A No, sir.
Q —or does he just let you stay there?
A Yes, sir. But I work, you know, in two bars. He has got two bars and I work in his bar and my brother's bar, too.
Q The money you get though is $60 per week?
A Yes, sir.
Q How long have you been doing this?
A For three months and—for about four months last year and three months this year.

Q What is the name of the—never mind. You have answered that. Now, before you began working again at this bar—
A Yes, sir.
Q —where were you working or were you working?
A Well, I worked in refrigerators.
Q Doing what?
[9] A Refrigerators.
Q Doing what with them, fixing them?
A Yes, sir, fixing them.
Q Did you work for a company?
A No, sir, just for my father.
Q For your who?
A My father.
Q Is he in the business of repairing refrigerators?
A No, sir. He buys refrigerators from the houses, you know, and we fix them and sell them.
Q Does he pay you for that?
A Yes, sir.
Q How much?
A Well, five or ten dollars.
Q How long did you do that? Was that a job that you did every day?
A Yes, sir, for about five years.
Q Five years?
A Yes, sir. But I worked, you know, as a bartender every weekend, Friday, Saturday and Sunday.
Q Well, you have testified that you worked there the last three months.
A Yes, sir.
Q Before that you were working there on the weekends?
A Yes, sir, weekends last year and then the years [10] before that.
Q So the only two jobs you have had during the last five years are as a bartender and as repairing refrigerators?
A Yes, sir. I mean waiter, you know, in the tables, a bartender, like a bartender, like a waiter.

Q How much does this come to a month all the work that you do; how much do you usually earn a month?
A About—I don't know. I don't know.
Q Well, do you make $60 a week now as a bartender?
A I sometimes get 30 or 40, you know.
Q Is it safe to say that you don't make over 60?
A No, not more than that.
Q You never make more than $60 a week?
A Yes, sir. If I work there on the weekend and I sell a refrigerator or something, you know, I make more.
Q You sell these refrigerators after you repair them?
A Yes, sir.
Q How much—
A They fix them for a lady or like that and I take it back.
Q Do you pay anything for the support of your children?
A Yes, sir.
Q Regularly?
A Every week.
Q Every week?
[11] A Yes, sir.
Q You give your mother a check; is that how you do it?
A No. You know, I buy them milk and everything.
Q Do you ever give your mother cash?
A Yes, sir.
Q Every week?
A No, not every week but $10, you know, $5, you know, when I can, you know.
Q Do you have any income other than this income that you have told us about, selling refrigerators or from being a bartender or waiting on tables?
A Well, sometimes, you know, I do a little hustling, you know.
Q A little hustling?
A Yes, sir.
Q What would that be? I don't understand what you mean by hustling. Gambling or what?

A No, sir, not gambling. You know, like hustling, you know, like shoplifting and that. I used to make it. I don't make it no more.
Q You used to shoplift occasionally?
A Yes, sir.
Q And then when is the last time you have shoplifted?
A Well, last year in November.
Q Last year in November?
A Yes, sir.
[12] Q Were you arrested for it?
A Yes, sir.
Q They caught you?
A (Nod affirmative).
Q You haven't done that since?
A No, sir.
Q Do you have a case pending against you now?
A No, sir. Last year I went to court for that and they gave me time, you know, and I paid.
Q They gave you a fine?
A No, time.
Q How much time?
A They gave me three months.
Q Just three months. So you were in the penitentiary from November, December and January?
A No, sir, in the county jail.
Q In the county jail for three months beginning in November?
A Yes, sir, but not—last year, you know, I think in January, something like that.
Q Have you ever been convicted for any other offenses?
A Yes, sir.
Q What for?
A For burglaries and shoplifting and using drugs.
Q And for using drugs?
[13] A Uh-huh.
Q Have you been convicted on any of these—
A Yes, sir.
Q Other than this shoplifting case?
A Yes, sir.

Q How many times have you been convicted?
A One time.
Q That's for the shoplifting?
A No, sir, for burglary and for shoplifting and for drugs.
Q So one time for each you have been convicted for burglary?
A No, twice. I mean one time for burglary and one time for drugs.
Q And one time for drugs?
A Yes.
Q When was the drug offense?
A About 10 or 15 years ago.
Q 10 or 15 years ago? How old are you, sir?
A 33.
Q What drug was it 10 or 15 years ago?
A Heroin.
Q Did you have it—Were you trying to sell it or was it in your possession?
A No, I was selling and using. I sold to a man.
[14] Q Okay. And did you receive any time?
A Yes, sir.
Q And how much time did you receive?
A I served eight years.
Q You served eight years?
A Yes, sir.
Q In what jail?
A In—
Q Huntsville?
A Yes, sir, Huntsville and Ellis.
Q When did you get out of jail for this drug offense?
A Five years after.
Q You got out early?
A Yes, sir.
Q What year was that that you got out, do you remember?
A In '65.
Q Were you convicted of anything after that, after you got out?
A (Nod affirmative).
Q What for?

A For burglary.
Q When were you convicted for burglary?
A '66.
Q And how much time did you receive then?
A Two years.
[15] Q Two years?
A Yes, sir.
Q And when did you get out?
A In '67, I think.
Q In '67 you got out. And have you been convicted after that?
A Yes, sir.
Q For what?
A For shoplifting.
Q This is the time you just told me about?
A No, sir, about three or four times.
Q Three or four times for shoplifting?
A Yes, sir.
Q Okay. And do you presently use heroin yourself?
A No, sir. I'm not using anymore.
Q When did you stop using?
A About—well, I used to use, you know, but I started taking medicine and I stopped using it.
Q When did you stop, more than a year ago?
A Yes, sir—no, because I used in November of this year.
Q You stopped in November?
A No, sir. I stopped for eight months this year and then I started again and then I stopped again last year.
[16] Q How long has it been since you have shot up heroin?
A About three months or four months.
Q Well, was it before Christmas or after Christmas?
A No, before Christmas.
Q In other words you haven't shot up in 1973?
A No, sir, I have.
Q You have?
A Yes, sir.
Q How recently?
A About one time a week.

Q One time a week?
A Yes, sir.
Q Do you still shoot up that one time a week?
A No, sir, no more. I stopped for three months already or four months, going on four months. But I shoot one time before that.
Q Are you on any methadone program now?
A Yes, sir.
Q Which program are you on?
A On Presa Street.
Q Presa?
A Yes, sir.
Q Is that Dr. Payte's methadone clinic?
A Yes, sir.
Q On South Presa, right?
[17] A Yes, sir.
Q And do you go there daily?
A Yes, sir, every day except Sunday I think, one day.
Q And how long have you been on the methadone program?
A For about two years.
Q Two years?
A Yes, sir, two years or three years.
Q So during part of that time you were also shooting heroin while you were on the program?
A Yes, sir.
Q But it has been three or four months since you last shot?
A Yes, sir.
Q Now, all these shoplifting offenses and burglary, were you doing that in order to support your habit?
A Yes, sir.
Q And were you able to support your habit in that way?
A Yes, sir. You know, just, you know, I tried, you know, everything I could.
Q So did that take care of your habit; the things you stole you would sell?
A Yes, sir.
Q And get the money to buy the heroin I guess?
A Yes, sir.

Q When is the last time you bought any heroin?
[18] A About January, something like that.
Q About January?
A Yes, sir.
Q Now, did you tell me that this drug offense that you were convicted for long ago, you got out of prison I believe in 1965?
A Yes, sir.
Q That was for the sale of heroin?
A Yes, sir, for selling.
Q Now, I don't notice any other narcotics offenses. Once you got out in 1965 did you continue to sell heroin?
A No, sir.
Q Are you sure of that?
A Yes, sir, I just, you know, I just use it, you know, in shoplifting and hustling.
Q In other words, you don't sell any heroin—
A No, sir.
Q —to get money to buy your heroin?
A Sir?
Q You do not sell any heroin yourself—
A No, sir.
Q —in order to get enough money to buy heroin that you use or used to use?
A No, sir. I used to shoplift all the time.
[19] Q And that took care of all your money?
A Yes.
Q All the money you needed to buy your heroin?
A And working.
Q Well, when is the last time you have sold heroin then?
A I haven't sold since I got caught.
Q In other words, that was the time you were convicted; you were arrested and convicted?
A Yes, sir.
Q And you haven't sold any heroin since then?
A No, sir.
Q Have you ever talked with anybody about selling it? Has anybody tried to buy heroin from you? Have

you tried to get heroin for them in order to sell to them?

A No, sir.

Q Are you sure of that?

A Yes, sir.

Q In other words, no one has ever come up to you and wanted to buy heroin?

A No, sir.

Q And you have never told anybody that you would try to get heroin to sell to them?

A No, sir.

Q In other words, you don't act for somebody else by not selling it yourself but somebody that you know [20] selling it to a person that you introduced him to?

A No, sir.

Q In other words, you are not an in between—

A No, sir.

Q For the sale of heroin?

A No, sir.

Q Now. you can say here today that you have not discussed the sale of heroin with anybody in the last year?

A I don't understand you, sir.

Q Have you talked to anybody about selling heroin to them during the last year?

A No, sir.

Q You are sure about that?

A I just, you know, I discuss it, you know, when we buy it, you know, to fix it just, you know.

Q Well, say you bought some heroin; would you ever then sell or would somebody ask you to buy some of that heroin?

A No, sir.

Q Has anyone ever asked you if they could buy an ounce of heroin or more from you?

A No, sir.

Q When you purchased heroin in what quantities would you buy it?

[21] On papers.

Q Would you ever purchase grams?

A Yes, sir, sometimes.

Q Would you ever purchase ounces?

A No, sir.

Q What is the most number of grams you have ever purchased at one time?

A Well, half a paper.

Q Well, but if you bought it in balloons, how much?

A One-half gram, $16.

Q Just one-half gram?

A Yes, sir.

Q When you were an addict and when you were using every day—I guess there was the time when you used every day?

A Yes, sir.

Q At that time you must have been buying every day, weren't you?

A Yes, sir.

Q Now, how many—Did you shoot more than one gram a day when you were really bad off?

A Yes, sir.

Q About how many grams?

A About two.

Q About two grams?

A Yes, sir.

[22] Q So you would have to buy heroin four times a day—

A Yes, sir.

Q —in order to satisfy your habit?

A Sometimes I buy one and a half, you know, buy a half and then go and get some more money and buy another half and then another half.

Q Did you buy that heroin over on Guadalupe Street?

A No, sir.

Q Where would you buy it?

A Up here on Poplar or anyplace.

Q Poplar?

A Yes, sir, or downtown.

Q Did you have one person you always would buy from or did you buy from several people?

A No, I would buy from anybody that sells it.

Q Now, your place is on the 2200 block of Guadalupe, right, your bar where you live?
A Where I work, yes, sir.
Q And you never buy any over there?
A No, sir. I haven't fixed, you know. I was here in town. I buy it here in town when I buy it.
Q Who were some of the people that you bought it from?
A Just anybody here selling in town.
Q I would like to know and the Grand Jury would like to know certain names.
[23] A I just, you know, from anybody that sells there, you know, Juan or another boy up there sells at that street down there.
Q But now you say you are buying something like three or four times a day?
A Yes, sir.
Q And isn't it true that if you don't get that heroin every day you will get sick? When you were shooting two grams a day—
A Yes, sir.
Q —if you didn't have any heroin that day, what would happen?
A I would be sick.
Q Is that a pleasant experience?
A No, sir.
Q Has that happened to you often?
A Yes, sir.
Q So would you buy heroin four times a day every day when you had a two-gram a day habit?
A No, sir. Sometimes I couldn't make it.
Q And then what would happen?
A I just wouldn't make it.
Q You would get sick?
A Yes, sir.
Q Or would you get one gram a day. How would you do [24] that?
A I would just try and see for how much I could get and then if I can't get no more I have to wait until another day.

Q And even though you probably did purchase heroin quite a large number of times you don't know anybody by name that sold it to you?
A Yes, sir, a couple of boys.
Q Who?
A Juan. I don't know his last name but he sells here downtown.
Q On what street?
A Where the bridge is, that way.
Q What bar does he work out of or does he work out of a bar?
A Sir?
Q What place does he hang out in?
A He stands there like in front of the movies, you know, or close to the bridge or the Alameda Theatre.
Q You don't know this man's last name?
A No, sir.
Q Do you know his nickname?
A No, sir. I don't think—I don't know. I just, you know, when everybody would buy from him I would buy from him, too.
[25] Q How much did he sell a gram for?
A 14 or $13.
Q For one gram?
A No, sir, for half, you know. I would buy a half.
Q Do you know anyone over on Guadalupe Street that sells heroin? Certainly around your—the place where you work and that area lots of people do sell heroin, don't they?
A Well, yes, sir.
Q Do you know any of them?
A No, sir. I haven't, you know, been too much, you know.
Q You can't give us any names of people who sell heroin over there?
A No, sir, because I don't know who is selling there, you know. I have been to, you know—I haven't been down lately, you know.
Q Let me ask you once again, Mr. Mandujano, have you ever talked to anybody about selling them heroin in the last year?

A No, sir.
Q No one has ever given you any money—
A No.
Q —to go buy them heroin?
A No, sir. Like, say, somebody comes for me to cut for [26] him? No, sir.
Q That doesn't happen either?
A Because they don't trust me like that, you know.
Q If you had the money would you be able to buy an ounce of heroin?
A Well, no, sir, I don't think so.
Q In other words, if you had $650 right now—
A Yes, sir.
Q —do you think you would be able to purchase one ounce of heroin?
A No, sir, I don't think so.
Q Where would you go to try and do that?
A Well, I wouldn't try to.
Q You wouldn't even try?
A No, sir.
Q Do you have a car?
A Yes, sir.
Q What kind is that?
A A '65 Pontiac.
Q That's the only car you have?
A Yes, sir.
Q Is your wife a heroin addict?
A Yes, sir. She—I mean we are both using the medicine.
Q You are both taking the medicine?
[27] A Yes, sir.
Q Do you know when the last time she has used heroin is?
A The same time I did.
Q You both stopped together?
A Yes, sir. We stopped and then sometimes we try it and sometimes, you know, we don't. I mean we have stopped for a long time now.
Q Mr. Mandujano, our information is that you can tell us more about the heroin business here in San Antonio than you have today. Is there anything you would like to add telling us more about who sells heroin?

A Well, sir, I couldn't help you because, you know, I don't get along with the guys and I just can't tell you, you know.
Q Do you have a gun by any chance?
A No, sir.
Q You don't own a gun?
A I own one, yes, sir.
Q Where is it?
A In my house.
Q What kind of gun is it?
A It is a .32.
Q When did you buy it?
A Several years ago.
[28] Q At a gun shop?
A No, sir.
Q Who did you buy it from?
A From another guy.
Q What was his name?
A Alfredo.
Q Who?
A Alfredo.
Q Alfredo who?
A Morine. I think Morine, something like that.
Q Is he from San Antonio?
A I don't know.
Q Have you seen him lately?
A No, sir.
Q Do you know where he got that gun?
A No, sir.
Q What kind of gun was it?
A A .32.
Q What kind of gun is that?
A I think it is a .32, sir.
Q A what?
A A .32.
Q A .32 Springfield or what kind of gun is that? Do you have any idea?
A No, sir. It has a little lion.

[29] Q You bought it here in San Antonio?
A Yes, sir.
Q How much did you pay for it?
A $25 I think, $23 or $25, something like that.
MR. LUCKEL: I have no further questions. Would someone like to ask a question?
MEMBER OF THE GRAND JURY: Have you filed an income tax return this year yet?
THE WITNESS: No, sir.
MEMBER OF THE GRAND JURY: Did you do one last year?
THE WITNESS: No, sir. A what, sir?
MEMBER OF THE GRAND JURY: Income tax.
THE WITNESS: No, sir.

QUESTIONS BY MR. JOHNSON:

Q Is this .32 gun, is this a pistol?
A Yes, sir, automatic, small gun. I have it in my house.
Q You had two in your house?
A No, sir. I have it in my house.
Q Where do you keep it in your house?
A I keep it high enough.
Q In the clothes closet?
A Yes, sir, because the police went into my house one [30] day and he told me, you know, I have to keep it high and not to carry it in the car, you know, just to keep it in the house, you know, and I put it high enough, you know.
MR. LUCKEL: Mr. Mandujano, thank you very much for testifying today. You will be excused now.

(End of Proceedings.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Criminal Action No. SA-73-CR-163

[Received in U.S. Clerk's Office July 23, 1973, Western District of Texas, San Antonio Division]

UNITED STATES OF AMERICA

vs.

ROY MANDUJANO

MOTION FOR SUPPRESSION
OF TESTIMONY BEFORE GRAND JURY
AND
MEMORANDUM BRIEF

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES ROY MANDUJANO, Defendant in the above entitled and numbered cause and respectfully moves this Honorable Court for an order suppressing for use as evidence the testimony given by the said Defendant before the Special Grand Jury, which convened on or about May 2nd, 1973 for the following reasons to wit:

I.

That at the time of Defendant's appearance and testimony before the Special Grand Jury, Defendant's appearance and testimony was in response to a subpoena served on him.

That Defendant, Roy Mandujano was at the time of his appearance before the aforesaid Grand Jury, a probable or putative Defendant by virtue of prior investigations by various Law enforcement agencies, defendant having been investigated by narcotics undercover agents during the latter part of March, 1973, and prior to his appearance on May 2, 1973, before the Special Grand

Jury. This investigation of Defendant by undercover narcotics agents is the basis for count one of this indictment against Defendant. He was thus entitled to the warnings and requirements as required by *Miranda* v. *Arizona*, 384 U.S. 436, 16 S. Ct. 1602, 16 L. ed. 2d (1966), cited in *U.S.* v. *McGinnis*, 344 F. Supp. 89 (1972) (D.C., S.P. Texas).

II.

Referring to "A person who is virtually in the position of a Defendant", which was treated by *U.S.* v. *Fruchtman*, 232 F. Supp. 534 (1968), the Ohio District Court, N.D., Ohio, W.D., the Court pointed out "that although the government may not be seeking and indictment against a witness at the time he takes the stand, there may come a point in the proceedings when the situation changes to such an extent that the witness becomes virtually . . . . a defendant." In this cause, Roy Mandujano was in a position of a Defendant, from the moment he entered the Special Grand Jury Room and throughout the whole of the aforementioned Grand Jury proceedings. In *U.S.* v. *Luxenberg*, 374 F. 2d 241 (1967), the Sixth Circuit Court stated:

"This Court has held that a person who is virtually in the position of a Defendant must be accorded the same rights as a Defendant." As per *U.S.* v. *Luxenberg*, Supra, the rights due Roy Mandujano were the minimum warnings of his Constitutional rights to:

A. Refuse to answer questions tending to incriminate him.
B. That anything he says will be used against him.
C. That he could, during anytime in the proceedings, refuse to answer any questions tending to incriminate him, and request legal counsel.

III.

Further, Defendant submits that his subpoena for purposes of testifying as a witness was to extract perjurious testimony as evidenced by the allegations contained in

count one of the Indictment, specifying an alleged transaction taking place on or about the 29th day of March 1973, which, taken in the light of count two of the Indictment, shows no further requisite action for purposes of filing charges.

WHEREFORE, PREMISES CONSIDERED DEFENDANT herein prays that, upon a hearing, this Honorable Court enter is Order, suppressing all testimony of Defendant, given before the Special Grand Jury on May 2, 1973, and holding said testimony cannot be used as evidence against this Defendant in either count of this or any other Indictment.

Respectfully Submitted,

RUBEN SANDOVAL
500 N. Main
San Antonio, Texas
78205

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA 73 CR 163

UNITED STATES OF AMERICA

v.

ROY MANDUJANO

ANSWERS TO DEFENDANT'S PRETRIAL MOTION

Comes now the United States of America by and through the United States Attorney and in answer to defendant's motion to sever, to dismiss count one and to suppress testimony given by defendant before the special grand jury, says that these motions are without merit and should be denied for the reasons hereinafter assigned.

I.

Severance

Rule 8(a) of the Federal Rules of Criminal Procedure permits joinder of offenses against a single defendant if any one of three tests is satisfied. *First*, they may be joined if they are based on the "same act or transaction." An essentially pragmatic construction based on precedents from civil procedure, has been applied in determining what is meant by "transaction." Under this rule permitting joinder of two or more offenses, if indictment is based on same transaction, an interpretation of the word "transaction" frequently involves the balancing of conflicting interest, speed, efficiency, and convenience in function of federal judicial machinery against right of accused to a fair trial, without any substantial prejudice to that right occasioned by joinder of offenses. *Second*, offenses may be joined if they are based on "two or more acts or transactions connected together or constituting parts of a common scheme or plan." These two grounds for joinder have caused little difficulty or controversy. The desirability of joinder of offenses arising out of the same or related acts is apparent.

Finally, Rule 8(a) permits joinder of offenses if they are "of the same or similar character." Here naturally there are obvious dangers of prejudice to the defendant.

The Government would substantially base its position on test number 2, that being that the two acts are connected together and constitute a common scheme. Certainly the proof as to the false statement charge will require proof involving the initial violation alleged in count one of the indictment. Government submits that the two alleged acts are connected together, in that they basically involved the one transaction, an attempt to distribute a narcotic controlled substance in violation of law.

Rule 8(a) allows free joinder of offenses charged against a single defendant and motions for relief from prejudicial joinder being authorized by Rule 14 of the Federal Rules of Criminal Procedure are addressed to the sound discretion of the trial court. *United States* v. *Lane*, 465 F.2d 408 (5 CA 1972) and *United States* v. *Abshire*, 471 F.2d 116 (1972). The burden of demonstrating prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed by a reviewing court. The defendant must show something more than the possibility that a separate trial might have offered him a better chance of acquittal. See *Spencer* v. *Texas*, 385 U.S. 554 (1967).

In the case at bar, both offenses rose out of the same sequence of events so that the government would submit that joinder would be proper under Rule 8(a).

II.

Dismissal

Count one of the indictment alleges a violation of Title 21, United States Code, Section 846 (attempt and conspiracy). That provision of law provides that "any person who attempts or conspires to commit any offense

defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." The defendant in his brief states that the Government must prove beyond a reasonable doubt that any substance the defendant is alleged to have represented as heroin was in fact heroin and cites case law in support of his point. The Government submits that it is not necessary in the case of a conspiracy or attempt, to prove that there was actually a substance involved. Cases cited by defendant all involve actual sale of narcotic substances, that is the actual transfer of the substance alleged to be narcotic and it was necessary in those cases for the Government to prove beyond a reasonable doubt that the quantity of narcotics on the date alleged in those indictments was in fact a narcotic substance.

It is *obvious* by reading the statute that the same requirements as to conspiracy were to be considered in the crime of attempt in that they are joined together in Title 21, United States Code, Section 846. Defendant has attempted to make the crime of attempt synonomous with the crimes of importation, distribution and transportation of narcotics. Obviously the Congress considered it to the contrary and analogous to the crime of conspiracy.

Sections 406 (21 USC 846) and 1013 (21 USC 961) of the Controlled Substances Act of 1970 added the crimes of attempt and conspiracy to the list of substantive offenses which are prescribed by that Act. Section 406 refers to attempts to commit crimes defined by Title II of the Act which are, generally, the manufacturing, distributing, possessing, and similar offenses. Section 1013 treats attempts to commit offenses which involve Title III of the Act, the import and export of controlled substances. Federal law has long differentiated between the commission of the substantive offense and the attempt to commit the offense. The general rule is that if an attempt is not defined by the statute it cannot itself be punished. Thus the Supreme Court in *Keck* v. *United States*, 172 U.S. 434 (1899), held in a smuggling prosecution that

> Whilst it (18 USC 545) embraces the act of smuggling or clandestine introduction, it does not include mere attempts to commit the same . . . It was indeed argued at bar that as the concealment of goods at the time of entering the waters of the United States tended to render possible a subsequent smuggling, therefore such acts should be considered and treated as smuggling; but this contention overlooks plain distinction between the attempt to commit an offense and its actual commission. Id. at 444.

The present Act, of course, avoids this difficulty; it does contain what may be called a "general" attempt statute at least insofar as offenses under the Controlled Substances Act are concerned.

It has been said that criminal attempt "is more intricate and difficult of comprehension than any other branch of the criminal law." *Hicks* v. *Commonwealth*, 86 VA 223, 9 S.E. 1024, 1025 (1889). Attempt has been a part of the criminal law for a long time, but time alone has not been successful in resolving all of the problems which attempt creates. The first problem, then, is definitional: at what point does mere preparation cease to be an innocent act and become criminal. The Controlled Substances Act, like any other federal statute which speaks of attempt, does not define the term, and the courts will presumably have to rely upon the common law, such as it is, to provide such a definition.

As to the question of what constitutes the elements of attempt, the Government would submit that to constitute an indicable attemp there must be a specific intent to commit a particular crime; a perpetrating act done in pursuance of such intent, but which falls short of actual commission of the crime and that further there must be at least *apparent ability* to commit the intended crime and the intended crime must be legally possible of commission.

Mr. Justice Holmes made the following statement with respect to the elements of this offense:

> Preparation is not an attempt but some preparation may amount to an attempt. *It is a question of degree.* If the preparation comes very near to the accomplishment of the act, then intent to complete it renders the crime so probable that the acts will be a misdemeanor, although there is still a locus poenitentiae (opportunity to change one's mind), in the need of a further exertion of the will to complete the crime.

In *United States* v. *Coplon*, 185 F.2d 629 (2 CA 1950), cert. denied 342 U.S. 920, the able justice Judge Learned Hand said:

> A neat doctrine by which the test when a person, intending to commit a crime which he fails to carry out, has 'attempted' to commit it would be that he has done all that is within his power to do, but has been prevented by intervention from outside; in short, that he has passed beyond any locus poenitentiae. Apparently that was the original notion, and may still be the law in England; but it is certainly not now generally the law in the United States, for there are many decisions which held that the accused has 'passed beyond' preparation, although he has been interrupted before he has taken the last of his intended steps. The decisions are too numerous to cite, and would not help much anyway for there is, and obviously can be, no definite line. . . . We have found scarcely any decisions of federal courts, but so far as they go, they are in accord.

There is also a recent Fifth Circuit case in point, *Mims* v. *United States*, 375 F.2d 135 (5 CA 1967). The court in that case stated as follows:

> Much ink has been spilt in an attempt to arrive at a satisfactory standard for telling where preparation ends and attempt begins, but the test adopted in the various jurisdictions fall somewhere between the two extremes represented respectively by the old common law guide and one suggested by the model penal code of the American Law Institute. The question has not been decided by this court; but, in the event of another trial help can be obtained from the few federal cases on it.

The common law test is discussed in the *Coplon* case, supra, and the ALI model penal code is reviewed in the Butler case, *United States* v. *Butler*, 204 F. Supp. 339 (S.D. N.Y. 1962), wherein the court said:

> As defined by the model penal code, the crime is essentially 'one of criminal purpose implemented by an overt act strongly corroborative of such purpose.'

The court further went on to say:

> Thus the question involved in distinguishing preparation from attempt is whether the actor's conduct is sufficiently unequivocal to be corroborative of the actor's purpose. Were that the question before me, I would have little difficulty in holding that the defendant attempted to purchase narcotic drugs. He telephoned twice to discuss the purchase, he arranged for delivery to occur at a designated place in time, he arrived at that place at that time, and he identified himself to the agent by the name used in the telephone conversations.

In looking for a good general definition of attempt it may be helpful to see W. Mathis and E. Devitt, Federal Jury Practice and Instructions, Section 13.14, 1965, and E. Devitt and C. Blackmon, Federal Jury Practice and Instructions, Section 16.16, 1970.

In section 13.14 as follows

> To attempt an offense means wilfully to do some act, in an effort to bring about or accomplish something the law forbids to be done. An act is done wilfully, it is done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

Section 16.16 states exactly the same jury instruction.

Naturally discussing attempt involves the proverbial "lawyer joy" of the mixed question of fact and law and the Government would submit that only a review of the

evidence would enable this Honorable Court to consider whether an attempt actually was consummated. The Government submits that the defendant did have the intent and that further it would show that there was an overt action which constituted a criminal attempt. The Government would further show that the overt action need not itself be illicit or forbidden. Indeed the defendant's conduct may be entirely lawful; however, such conduct becomes punishable when committed in perpetration of the criminal intent. These facts can be shown at time of hearing from testimony elicited from agents of the Drug Enforcement Administration.

The general view today is that the material factor test applies, this being applied when the accused's conduct has gone beyond mere preparation and consists of acts which in ordinary experience would be a material factor in bringing about the type of crime involved. Acts of preparation are equivocal. They may or may not reflect a criminal intent. Where, however, the accused has committed an act which would directly tend to accomplish the crime (a material factor), his conduct is no longer equivocal and criminal sanction should be imposed. The Government would submit that the same standards as used in the conspiracy should be used in an attempt and that once the criminal intent is coupled with any overt act in furtherance of that criminal intent, that would constitute the crime of attempt.

III.

Suppression of Testimony

The general rule is that a grand jury witness is not entitled to be warned of his right to counsel and his right to remain silent. *United States* v. *DiMichele*, 375 F.2d 959 (3 CA 1967). In that case the defendant was convicted of perjury for a statement made before a grand jury concerning illegal gambling activities. His appearance before the grand jury was a result of a subpoena served on him by F.B.I. agents, at the time he was arrested for participating in a gambling session. When

he appeared before the grand jury, he was questioned about the events which led to his arrest. Even though the defendant witness had been arrested (and was therefore in custody) he received no warning at the time he appeared before the grand jury some two weeks later. All Circuits with the exception of the Sixth follow this rule. The Sixth Circuit recognizes that when a man ceases to be merely a witness in a general investigation but has been placed virtually in a position of a defendant he must be afforded virtually in a position of a defendant he must be afforded the full panoply of rights due a defendant in custody.

Though the Fifth Circuit has recently addressed the question of the scope of *Miranda* in the context of grand jury investigations, Matter of *Carson*, 424 F.2d 202 (5 CA 1971), it has yet to deviate from the general rule as expressed in *DiMichele*, supra. In *United States* v. *Morado*, 454 F.2d 1967 (1972), the Fifth Circuit recognized the existence of the Sixth Circuit rule but declined to face it squarely since the investigation in that case had not passed the stage of "being a general inquiry into an unsolved crime and had not focused upon the defendant as a person whom the Government planned to indict." The key in the *Morado* case appears to be whether or not the focus of the investigation is centered upon the witness who appeared before the grand jury. From the aforementioned review of the Sixth Circuit this appears to be an overstatement of the virtual defendant test.

In another recent Fifth Circuit case, *United States* v. *Daniels*, 461 F.2d 1076 (1972) which has relevance here the court held that there is no requirement that the Government advise the witnesses before the grand jury that counsel will be appointed for them free of cost in the event they are indigent. The witness had been advised of the self-incrimination waiver which he had signed and that an attorney outside the grand jury room would be permitted, but had not been advised that counsel would be appointed if he did not have the means to employ one himself. The court noted that he was not under indictment, but merely a witness.

In conclusion, under the general rule as followed by all the circuits with the exception of the Sixth the

defendant was not entitled to any warning rights whatsoever. The defendant had not become a virtual defendant as has been defined by the Sixth Circuit. He had not been arrested nor indicted nor had plans been made to present an indictment to the grand jury against him when he testified. He was merely called upon to provide information to the grand jury concerning various violations of criminal law committed in the Western District of Texas and while being questioned accordingly made false statements to the grand jury.

While it is the Government's contention that under the virtual defendant rule of the Sixth Circuit or the general rule pertaining in all other circuits the witness was not entitled to a warning. It should be noted that the defendant was given a warning by Government attorneys simliar to a full *Miranda* warning that included right to refuse to answer questions which tend to be incriminating and the right to have counsel present outside the grand jury room to consult if the need arose. The case of *United States* v. *Wilcox*, 450 F.2d 1131, 1140 (5 CA 1971) has held that even though a witness had not voluntarily waived his Fifth Amendment rights he could not thereafter commit perjury with impunity. The Government submits that this case stands for the principle which is despositive of this case before this court.

IV.

Conclusion

Wherefore premises considered, the Government would move the court to overrule defendant's motions.

Respectfully submitted,

WILLIAM S. SESSIONS
United States Attorney

By /s/ John M. Pinckney, III
John M. Pinckney, III
Assistant U.S. Attorney

[Certificate of service omitted in printing]

EXCERPTS FROM THE TRANSCRIPT OF THE AUGUST 24, 1973, PRE-TRIAL HEARING

[35] MR. PINCKNEY: That is correct. He was not a defendant at the time, no indictment, and we go back to what we are talking about a while ago with conspiracy, and I have talked to Mr. Alexander about this. I am not making a self-serving statement on behalf of the government, but there might very well, looking at the indictment on its face without evidence behind it, it might look like this was a real setup job. Here is an allegation of an offense occurring in December and the individual was called before the grand jury and asked questions, and the government submits that he ended up perjuring himself as to the transactions back in December. So, it does, on its face, look like the omnibus arm of the government kind of taking advantage of the individual where, in fact, the government would submit that in this case the original transaction occurred—Here you get into the bureaucracy of the Federal Government, the B.N.D.D., Bureau of Narcotics and Dangerous Drugs, then you have the Office of Drug Abuse Law Enforcement, another arm of the Justice Department in the Executive Branch, proceeding with the grand jury, having available to them some intelligence from B.N.D.D. as to this individual's heroin trafficking in San Antonio. The government will submit that at that point, after it was clear that the government thought that there was a [36] violaion of the perjury statute or the false representation before the grand jury, Mr. Luckel brought this case to the United States Attorney's Office and it was then and only then that I said, "You have a case of perjury, but there is also possibly a violation of the attempt statute back in December." It was only then that the two were consolidated and presented to the grand jury, and an indictment was returned.

I would be leery in the future, with the background I have had in this case, with the knowledge that I now have, to bring someone before a grand jury and then later indict him in this situation, but it did not bother me because I knew the facts. In other words, it was not

the omnibus arm of the government setting someone up in both of these cases, this being the first two attempts that have been brought in this court out of the United States Attorney's Office. I went around to everyone. No knowledge as to attempt. So,—

* * * *

[DIRECT EXAMINATION OF EB LUCKEL]

[56] Q And is it your position now that after he testified before the grand jury and committed, in your opinion, a perjury, that you then reviewed the facts and were able to present the indictment to the next grand jury that met in June?

A That is not quite correct. I had planned to proceed on the false statement before a grand jury indictment. I had drawn up the indictment with that charge only in mind. I, of course, talked this over with some people in my office, and as I was doing it I encountered several problems with respect to Mr. Mandujano. I felt that there might possibly be three counts of perjury in the indictment drawn up against Mr. Mandujano, and not being able to resolve that myself, I ultimately called up Jerry Handy, the Chief of the Criminal Division, who is the person that we go through in preparing all of our cases, and consulted him on the matter of whether I should draw up this false statement indictment in one count or three counts. I reviewed the facts to him of these what I thought might be three counts of false statements, and he suggested to me that we might [57] have an attempt case in violation of Title 21, U.S. Code 846. At that time I began to give further consideration to that in not only Mr. Mandujano's case, but Mr. Rangel's case as well. It was subsequent to that time that I determined to present an indictment charging Mr. Rangel and Mr. Mandujano with attempt in addition to the false statement charge.

EXCERPTS FROM THE TRANSCRIPT OF THE AUGUST 28, 1973, PRE-TRIAL HEARING

[8] EB LUCKEL, called as a witness in behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Sandoval:

Q Would you state your name and occupation, please?

A My name is Eb Luckel, and I as a special attorney employed by the Department of Justice, assigned to the D.E.A. Task Force here in San Antonio. It was formerly the Office for Drug Abuse Law Enforcement.

Q How long have you been in that capacity?

A A little over a year.

Q Briefly, could you describe what you do?

A I am responsible with several other attorneys for conducting the special federal grand jury empaneled in the Western District of Texas, San Antonio and Austin Divisions. In addition, I serve as legal advisor to the agents and officers assigned to the D.E.A. Task Force. That would mean I would advise them in any legal matters that come up in their operations as law enforcement officers, and finally I handle all legal matters through indictment, at which time it is turned over to the United States Attorney's Office.

[9] Q You handle all legal matters to indictment?

A Up through.

Q Up to?

A Through indictment.

Q Were you acting in this capacity on or about May 2nd, 1973?

A Yes, sir, I was.

Q Do you remember having occasion to have met a Mr. Roy Mandujano?

A Yes, sir, he was a witness before the grand jury on May 2nd or 3rd, 1973.

Q Had you ever seen Mr. Mandujano before?

A No, I hadn't.

Q Did you know of him?

A I knew of him, yes, I did; perhaps two weeks prior to Mr. Mandujano's appearance, I received his name as a prospective grand jury witness. I might have heard his name prior to that at the time Officer Cavalier was involved in the case that he attempted to make against Mr. Mandujano. When that was, I am not sure.

Q Did you ever have occasion to talk to Mr. Cavalier about Mr. Mandujano?

A Yes, sir.

Q Did you ever see any written reports?

A Excuse me. I had occasion to talk to Officer Cavalier concerning Mr. Mandujano and in relation to his possible [10] appearance before the grand jury.

Q Approximately how long before his appearance before the grand jury did you talk to Mr. Cavalier?

A Approximately two weeks.

Q At that time did you discuss the transaction between Mr. Mandujano and Mr. Cavalier?

A Yes, sir.

Q Did you happen to see a report on this transaction by any chance?

A I believe I did.

Q You saw a report?

A I did see a report if there was one available. I think there was one available. Now, just to make it clear, we are talking about the transaction that Officer Cavalier had with Mr. Mandujano a month or so prior to May of this year.

Q You are talking of on or about possibly March 29th of '73?

A I would assume that was in that general time area.

Q You also say that you had occasion to look at a written report in reference to that same transaction, that is, the one of March 29th of '73?

A No, I can't say that definitely. I would have looked at the written report if there had been one available, and I assume there was one written by Officer Cavalier after he had these negotiations with Mr. Mandujano. If there was one available at that time, I did see it.

[11] Q But you don't remember specifically?

A No, I recall the facts involved in that transaction, though. He did relate those facts to me.

Q Is it correct to say that Mr. Mandujano was subpoenaed based upon your conversation with Agent Cavalier?

THE COURT: That what?

Q Subpoenaed based on your conversation with Agent Cavalier.

A That is correct.

MR. SANDOVAL: Your Honor, may I approach?

THE COURT: Sure.

Q Let me ask you, Mr. Luckel, have you ever seen that report before?

A I am almost certain that I have.

Q Did you ever have occasion to go over it with Agent Cavalier?

A I don't think so. It shows here, I believe, that the report was made on June 4th, 1973, which would be subsequent to the date of the grand jury.

MR. SANDOVAL: For the record, I am going to ask that this report be identified and referred to as Defendant's, Mandujano's Exhibit A. Your Honor, I have got some writing on it. I wonder if we could have a copy—

THE COURT: Okay. Well, why don't you just identify that.

A Now, Mr. Sandoval, I can't recall the date that the indictment was presented to the grand jury. I believe it [12] was June 13th.

MR. PINCKNEY: I have on my file copy, your Honor, June 14th, as the date the indictment was returned.

MR. SANDOVAL: I have on my file, June 13th.

THE COURT: What does the Clerk's file reflect?

MRS. MUNFORD: June 13th.

THE COURT: June 13th. All right.

Q (Mr. Sandoval continuing): But you don't recall whether you ever actually saw Defendant's Exhibit 1?

A Well, I certainly did see it, because when I prepared the indictment, I would have at the same time compiled the original of this document along with whatever other

documents would be in Mandujano's file, and would take those to the United States Attorney's Office.

Q Let me ask you, did you have occasion to go through it briefly and know what it contained?

A Yes, I was well aware of all the facts contained in this report. Whether I read it or not, I am not absolutely positive.

Q Were they the similar facts that were related to you by Agent Cavalier two weeks prior to Mr. Mandujano's appearance before the grand jury?

A Yes, sir, that is correct.

Q Then, at the time Mr. Mandujano appeared before the grand jury, you knew about the prior alleged attempt to buy; is [13] this correct?

A That is correct.

Q Do you recall how many witnesses appeared that day, that is, May 2nd, 1973, besides Mr. Mandujano?

A I don't recall the exact number. My guess would be approximately eight.

Q Let me ask you, Mr. Luckel, do you recall having any conversation with Mr. Mandujano prior to his appearance before the grand jury on May 2nd, 1973?

A No, I don't.

Q You don't recall whether you asked him whether he wanted an attorney or not?

A No. Now, that was when he appeared before the grand jury on May 2nd; after he had been sworn in, I began to relate to him certain rights and those included the question—I advised him that he had the right to have an attorney. Now, that was not prior to the grand jury session. That was when he was sworn in as a witness.

Q You advised him that he had the right to an attorney?

A Yes, sir.

Q Do you remember what his response was?

A Well, it would appear in the grand jury transcript. I cannot remember what his response was.

Q This is a copy of the transcript. Would you read lines 11 through 21, please.

[14] THE COURT: You want him to read that out loud?

MR. SANDOVAL: Yes, your Honor.

A "Have you contacted a lawyer in this matter?" Answer: "No, sir, I haven't." Question: "I take that to mean that you do not wish the services of a lawyer here today?" Answer: "I don't have one. I don't have the money to get one." Question: "Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to you, let me know." Answer: "Yes, sir." Question: "Is that clear?"

Q In other words, Mr. Mandujano never really said that he didn't want a lawyer, did he?

A He never said that, "I do not want a lawyer," no.

Q He stated to you that he could not afford one; is this correct?

A He said that—well, he said—If you could give me a copy of that, I might be able to recall. I can relate what he said if that is what the transcript said.

MR. SANDOVAL: Shall we go ahead and mark this as Defendant's Exhibit 2?

MRS. MUNFORD: Marked Defendant's Exhibit B.

A He said that he didn't have one and that he didn't have [15] the money to get one.

Q Do you recall whether you advised him that if he couldn't afford one, that the Court would appoint one for him?

A I did not advise him as to that fact.

Q Do you recall the reason for it; was it an oversight on your part?

A No, it was not an oversight. My purpose in providing this particular aspect of the warning, along with other things that I have not yet read, was to go well beyond the requirements for warnings given to a grand jury witness when they appear before a grand jury, and that was my purpose in giving any warnings, and the

warnings that I did give, I feel, amply satisfies the requirements set forth under the law.

Q Mr. Luckel, at the time Mr. Mandujano appeared before the grand jury on May 2nd, 1973, you stated you knew about a possible transaction that never occurred between Mr. Mandujano and Mr. Cavalier; is this correct?

A That is correct.

Q Did you have any idea at the time, that is, on May 2nd, 1973, whether or not Mr. Mandujano might be indicted as a consequence of that action?

A I had no idea that he would be indicted. I had no intent to present any indictment, to pursue an indictment, or in any other way to consider an indictment in regard to the [16] negotiations or attempt to purchase heroin between Officer Cavalier and Mr. Mandujano.

Q Let me ask you this, Mr. Luckel, at the time that Mr. Mandujano appeared before the grand jury, did you know then that he was going to be asked any questions in reference to his transaction or alleged transaction with Mr. Cavalier?

A Yes, sir, I did.

Q You knew about it, then?

A If you would like me to explain that, Mr. Sandoval, I will. It might clarify matters.

Q Well, let me ask you a few more questions, and then I will be through. Let me ask you, do you recall whether, during his testimony, Mr. Mandujano made any admissions of any prior offenses or anything like that?

A I don't recall. He may have. He may not have. I would have to refer to the transcript for that.

Q Would you look at page 13, please.

A Pardon?

Q Page 13 of the transcript, would you start from number and read down to number 22?

A Question: "How many times have you been convicted?" Answer: "One time." Question: "That is for shoplifting?" Answer: "No, sir, for burglary and for shoplifting and for drugs." Question: "So, one time for each. You have [17] been convicted for burglary?" Answer: "No, sir, twice. I mean one time for burglary and one time for drugs." Question: "And one time for

drugs?" Answer: "Yes, sir." Question: "When was the drug offense?" Answer: "About ten or fifteen years ago." Question: "Ten or fifteen years ago. How old are you, sir?" Answer: "Thirty-three." Question: "What drug was it, ten or fifteen years ago?" Answer: "Heroin."

Q Let me ask you, Mr. Luckel, at the time, did you know anything about Mr. Mandujano's past, that is, his criminal record?

A I can't say that definitely, although when we subpoena these witnesses we have a certain amount of existing intelligence and one document that we would frequently have would be a rap sheet, which would appear—which I imagine these convictions would appear on his rap sheet. Whether I had that or not, I really can't say, although we do have a considerable body of knowledge on witnesses when they do appear to testify.

Q I am asking you whether you knew of it yourself, not necessarily whether you had the records before you on that; did you know of those prior convictions?

A I can't say. My guess would be perhaps that I did, or I had information that he did have a record, or he had prior convictions, not knowing specifically what they were. [18] I really can't say definitely.

Q Would you please turn to page 19. Would you read from number 10 through number 1 on the next page, rather, number 2.

A Question: "And you haven't sold any heroin since then?" Answer: "No, sir." Question: "Have you ever talked with anybody about selling it? Has anybody tried to buy heroin from you? Have you tried to get heroin for them in order to sell to them?" Answer: "No, sir." Question: "Are you sure of that?" Answer: "Yes, sir." "Question: "In other words, no one has ever come up to you and wanted to buy heroin?" Answer: "No, sir." Question: "And you have never told anybody that you would try to get heroin to sell to them?" Answer: "No, sir." Question: "In other words, you don't act for somebody else by not selling it yourself, but somebody that you know selling it to a person that you introduced him to?" Answer: "No, sir."

Q Would it be safe to assume that that questioning was based on your conversations that you had with Mr. Cavalier prior to Mr. Mandujano's appearance before the grand jury?

A That is correct.

MR. SANDOVAL: I have no other questions. Thank you.

THE COURT: All right, Mr. Pinckney.

CROSS-EXAMINATION

[19] Questions by Mr. Pinckney:

Q Mr. Luckel, in your legal opinion, at the time you were having Mr. Mandujano subpoenaed to appear before the DALE grand jury, did the transaction, the prior transaction between Mr. Mandujano and Officer Cavalier, the report for which you have indicated you had knowledge of, did at that time, in your opinion, did that transaction constitute an indictable offense?

A No, sir, it did not.

MR. SANDOVAL: Your Honor, before he answers, I want to object to that. He has already stated he didn't know whether he was—

THE COURT: I couldn't hear you. You held your hand over your mouth.

MR. SANDOVAL: We object, your Honor. I think he has already stated before that, at the time, that he didn't know this was or was not going to be an indictment returned.

MR. PINCKNEY: That is not the question.

THE COURT: Now, wait a minute. I don't recall him testifying to that. I overrule the objection.

MR. PINCKNEY: All right.

Q Now, as to your prior knowledge as to the transaction and your asking questions as to the prior dealing—Well, let me go back. Strike that, please, sir. If, in your legal [20] opinion, it did not constitute an indictable offense, what was the reason that you obtained the appearance of defendant Mandujano by subpoena before the grand jury?

A Officer Cavalier, when he was relating the transaction that he had with Mr. Mandujano, indicated there was a person who delivered heroin to Mr. Mandujano daily. I believe it was at a certain lounge that Mr. Mandujano either owns, has an interest in, or manages. He also indicated that when—this is Officer Cavalier when he was discussing the possible purchase of heroin with Mr. Mandujano—Mr. Mandujano made certain attemps to contact people in order to purchase or in order to get the heroin for Officer Cavalier. Officer Cavalier saw him place several calls, and Mr. Mandujano stated to Officer Cavalier that he would try to get such and such a source to provide the heroin, on and on like that. Now, we wanted to get the details of this activity. In other words, who these sources for Mr. Mandujano are and whatever details the grand jury could determine of the actions of these potential sources, potential, clearly potential, inasmuch as they came from statements given by Mr. Mandujano and activity by him.

Q All right, sir. Now, on your direct testimony, in response to Attorney Sandoval's questioning as to your prior knowledge of this event and your asking questions as to this prior [21] dealing with Officer Cavalier by defendant Mandujano, is that a standard procedure that you use in interrogating witnesses before a grand jury—to have prior knowledge to inquire about?

A I don't believe we subpoenaed any witness that we didn't have an existing body of knowledge about, and in virtually every case we would ask questions about facts that we did have. That was, number one, a method to gauge the truthfulness of the person's testimony, and, number two, it was in the nature of a natural progression to result in answers to the ultimate questions. A simple example of that might be if a person is a heroin addict, he obviously has to have a source of supply, and you would say, "Are you an addict?" and his answer might be, "Yes." The natural question to follow that would be, "Who do you purchase heroin from?" or, "Where do you get your heroin?" Now, you would not ask him, "Who do you purchase your heroin from?" without first having asked him, "Are you an addict?"

to establish that fact, and, basically, what his habit might be, things like that. In the case of Mr. Mandujano we had information which led me to believe that he was being supplied heroin by one person regularly and possibly several other persons, and before I could determine whether—who these people were, the circumstances of the deliveries and whatever, I had to go through the step of [22] determining whether he ever offered to get heroin for anybody or to sell heroin. I am sure I asked him if he ever used heroin, and I am sure later I asked him if he ever sold heroin.

MR. PINCKNEY: I have no further questions, your Honor.

THE COURT: Do you have any further questions?

MR. SANDOVAL: I have a few.

REDIRECT EXAMINATION

Questions by Mr. Sandoval:

Q Mr. Luckel, you stated on cross-examination by Mr. Pinckney that you had a rather lengthy conversation with Agent Cavalier about transactions and phone calls and so forth made by Mr. Mandujano; isn't that correct?

A That is correct.

Q Then, would you not say that in your opinion as an attorney that Mr. Mandujano might have subjected himself to at least a possible charge of conspiracy based on the conversation with Agent Cavalier?

A A conspiracy with Agent Cavalier as a co-conspirator?

Q Expressly, to possess and/or possibly distribute drugs, based on the conversation you had as to amounts, phone calls, and so forth; based on your legal opinion, would it not be correct to say that perhaps he exposed himself to the charge of conspiracy?

[23] A I would say definitely not. Now, any conspiracy case that might have been present would not have involved Agent Cavalier, and any overt acts would have had to have been involving Mr. Mandujano and one of these sources. I can see a slight potential there for a

possible conspiracy case based around that, but not—a slight—well, I don't want to be held to that now. No, it didn't cross my mind.

Q A slight potential as far as Mr. Mandujano was concerned, was it not?

A No.

MR. SANDOVAL: No more questions.

THE COURT: All right. Any further questions?

MR. PINCKNEY: No, sir.

THE COURT: All right.

MR. SANDOVAL: Call Mr. Cavalier, please.

MR. PINCKNEY: Your Honor, may Mr. Luckel stay with me at this point?

THE COURT: Yes, sir.

ALFONSO CAVALIER, called as a witness in behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Sandoval:

Q Would you state your name and occupation for the record, please?

A My name is Alfonso Cavalier. I work for the San Antonio [24] Police Department, currently assigned to the Office of Drug Abuse Law Enforcement, which is now the Drug Enforcement Administration Task Force.

Q How long have you served in that capacity?

A Since May, '72.

Q Would you describe briefly what your job encompasses?

A Working on the narcotic traffic here in San Antonio by using undercover buys, surveillance, utilizing the grand jury.

Q I see. Were you working in that capacity on March 29th, 1973?

A That is correct, sir.

Q Do you recall whether you had an occasion to go to 2217 Guadalupe Street?

A That is correct.

Q Would you please state what prompted you to go there?

A I received information that the subject, who allegedly owns the Tally Ho Lounge at that location, was dealing in narcotics, that I could possibly make a buy from this subject.

Q Do you recall the name of that person?

A Roy Mandujano.

Q Did you know Mr. Mandujano prior to that occasion?

A No, sir.

Q Did you know of him?

[25] A Yes, sir.

Q Do you remember what time you got there, that is, at 2217 Guadalupe Street?

A Approximately 1:30 in the afternoon.

Q You got there approximately 1:30?

A Yes, sir.

Q Do you remember how long you stayed there?

A Several hours, until approximately 4:30.

Q Do you remember whether—were you by yourself, or were you with someone?

A I had a confidential informant with me, yes, sir.

Q Were you able to talk to Mr. Mandujano?

A Yes, sir, I was.

Q Do you recall whether at that time you had anything to drink?

A Yes, sir, I did.

Q You did. Do you remember what it was?

A I had two beers and a wine cooler.

Q Two beers and one wine cooler during all this period of time?

A I am sorry?

Q During all this period of time, between 1:30 and 4:30, you had two beers and one wine cooler?

A That is correct.

Q Did anybody else do any drinking?

A The informant had a beer, and I believe Mr. Mandujano had [26] a beer.

Q Was Mr. Mandujano present all the time that you were there?

A Not the total time, no, sir.

Q Would you state what you mean by "not the total time"?

A He was in my company until about 3:25, at which time he allegedly went to score me some narcotics.

Q At the time he went to score some narcotics for you, you say,—

A Yes, sir.

Q —how long was he gone; do you know?

A Approximately forty-five minutes to an hour.

Q Did you offer any money to him at that time when he left?

A We had discussed me purchasing an ounce of heroin from him. He was unable to make any contacts while I was there.

Q At the time he left did you offer him any money?

A He asked for money. He said he needed my money to score the ounce of narcotics.

Q Did you give him any money?

A Yes, sir, I did. I gave him $650.00.

Q How long was he gone, do you say?

A Approximately forty-five minutes to an hour.

Q What happened after he got back; do you recall?

A Yes, sir. He told me that he could score the ounce for me, but it would be a little later in the evening when his regular connection made his stop there, that I was to [27] call and call him telephonically, call him back by telephone, and make arrangements to pick it up later.

Q Did he give you back the money?

A Yes, sir, he did.

Q Did you ever have occasion to talk to him again after that?

A No, sir. I attempted to. He was not at the location or not at the Tally Ho.

Q Do you recall during the time that he was with you at 2217 Guadalupe Street, did he make any phone calls?

A Yes, sir, he made several phone calls.

Q Do you remember what the subject matter of any of those phone calls was?

A He was attempting to score narcotics for me.

Q Did you hear him say that?

A I heard one conversation where he spoke to one party, where he said he wanted to make a score, but he was out, and that the party said the party he was looking for wasn't home. They said that they would contact the party and tell them to get in touch with him as soon as they got back.

Q Did you have occasion to make a report?

A Yes, sir.

Q How many reports—do you remember how many you made?

A How many reports?

[28] Q Since March 29th, '73, how many reports have you made on this incident?

A One, sir.

Q One.

MR. SANDOVAL: May I approach the witness, your Honor?

THE COURT: All right.

Q Do you recognize that?

A Yes, sir.

Q Would you tell the Court what that represents?

THE COURT: Is that Defendant's Exhibit A?

MR. SANDOVAL: Yes, sir.

THE COURT: All right.

A This is a, I believe, Xeroxed copy of my report.

Q I see. Did you ever have occasion to talk to anyone about that report?

A How do you mean, sir? I'm sorry.

Q Did you ever talk to anyone in reference to what that report contained?

A Yes, sir.

Q Do you recall who that person was?

A That would be Mr. Luckel.

Q Do you recall how soon thereafter, that is, after March 29th, '73, you had occasion to talk to Mr. Luckel?

A That would be the early part of June.

[29] Q You had occasion to talk to him in the early part of June?

A Yes, sir.

Q You hadn't talked to him before about this?

A I had contacted Mr. Luckel. He was looking for witnesses for the grand jury—people that had possible knowledge of narcotic traffic in San Antonio. I suggested that Mr. Mandujano probably would make a pretty good witness.

Q I see. Let me ask you this. Do you know the date on that report?

A The date the report was written?

Q Yes, sir.

A Yes, sir.

Q Would you state what the date is?

A June 4th, 1973.

Q Could you explain to us, please, you know, the reason that it took so long for you to make the report?

A The case was aborted. We didn't pursue the case. We closed the case. There was no need to make a report. There was no actual transaction made.

Q Let me ask you this. What prompted you to make the report of June 4th?

A It was brought to my attention the report hadn't been made; also that they wanted details as to what had actually occurred on that day.

Q Sixty-seven days later it was brought to your attention [30] that a report had not been made?

A That is correct.

Q Was this the usual procedure?

A Normally, we don't make a report on an attempt. We might write a short note or a memorandum, information for our files, but on an attempt where no narcotics are purchased or where there is no loss of government money, normally, we just leave it alone.

THE COURT: Well, I understand, Officer, that you made this report so that Mr. Luckel would have access to the facts and circumstances in contemplation of a possible appearance of Mr. Mandujano before the grand jury?

A No, sir. I was informed that they were going to try and charge Mr. Mandujano in regards to perjury before the grand jury, and that they wanted some facts on the actual case, of my conversation with him on the 29th, so then I wrote the report.

Q Let me ask you. Do you have an idea, more or less, when was it that you talked to Mr. Luckel about Mr. Mandujano?

A I presume it would have been in April, sir.

Q Do you remember, more or less, the substance of your conversation?

A They were looking for witnesses for the grand jury.

Q They were looking for witnesses for the grand jury?

A Yes, sir.

[31] Q What I am asking you—

A I'm sorry, I didn't—They were looking for witnesses for the grand jury. I spoke to Mr. Luckel, telling him that I had attempted to purchase—

Q Just a moment. Who approached you on the possibility of procuring witnesses for the grand jury?

A My group supervisor.

Q Did he direct you to Mr. Luckel?

A Yes, that is our Special Attorney out of our office, who is also working with the grand jury.

Q Did you have occasion to talk to your supervisor about Mr. Mandujano?

A Immediately after the case I did, and, after that, not until he asked for witnesses, and I suggested to him that Mr. Mandujano would probably make a pretty good witness.

Q I see. Going back to my previous question, do you recall more or less the substance of your conversation with Mr. Luckel in reference to Mr. Mandujano?

A I told Mr. Luckel that I had attempted a purchase with Mr. Mandujano and through my conversation with him I believed that he had quite a bit of intelligence about the narcotic traffic and trafficking in San Antonio. That was basically what we talked about. He asked me to give him some more details as to Mr. Mandujano, give his name and address, and briefly related my conversation with him on that day as to [32] why I thought he had knowledge of the narcotic traffic here in San Antonio.

Q In other words, the contents of the report is basically what you covered with Mr. Luckel; is this not correct?

A Basically, yes, sir.

MR. SANDOVAL: No further questions.

THE COURT: All right. Mr. Pinckney?

MR. PINCKNEY: I have no questions, your Honor.

THE COURT: All right, you may step down, Mr. Cavalier.

Do you have any other witnesses, Mr. Sandoval?

MR. SANDOVAL: No, your Honor. At this time I would like to introduce into evidence Defendant's Exhibit B, which is the transcript of the grand jury.

THE COURT: You want to offer that in evidence?

MR. SANDOVAL: Yes.

THE COURT: All right. Do you have any objections?

MR. PINCKNEY: None, your Honor.

THE COURT: All right, it will be received in evidence.

MR. PINCKNEY: Your Honor, at this point I would like to give the Court the letter I promised pursuant to your instruction of Friday, and copies are being provided to both counsel for Mr. Rangel and Mr. Mandujano.

[33] THE COURT: All right, I take it, then, Mr. Sandoval has interrogated the witnesses that he wanted. What about you, Mr. Alexander; do you have any witnesses you want to present?

MR. ALEXANDER: No, your Honor, we do not.

THE COURT: Do you have any further evidence?

MR. PINCKNEY: I have no evidence, your Honor.

THE COURT: All right, does anyone have any further evidence to present?

MR. PINCKNEY: The government rests, your Honor.

THE COURT: Do you rest?

MR. ALEXANDER: The defendant Rangel rests.

MR. SANDOVAL: The defendant Mandujano rests, your Honor.

* * * *

[40] THE COURT: Let me ask you this. Suppose that the Court would find that there really was not an indictable offense insofar as Mr. Rangel was concerned. What effect would that have upon the second count of the indictment? And turning it around, just assuming that the Court would find that there was an indictable offense against Mr. Mandujano, would you have a different situation? See, what I am thinking about is, Mr. Luckel testified that he didn't at that time believe in his legal opinion that this was an indictable offense [41] that existed. Now, I wonder just how far this ignorance of the law goes. If a defendant is brought into court and he said he didn't know what the law was, well, they still try him and convict him. I just wonder whether the fact that the United States Attorney, or an attorney representing the government, didn't know—whether he is in a higher position than somebody who is charged with a crime. But be that as it may, if he was right in his belief that insofar as Mr.—as your client was concerned, that there was no indictable offense, then what effect would that have upon the second count? If he was wrong in his belief as to whether or not there was an indictable offense against Mr. Mandujano, what effect would that have on the second count? This is for you and Mr. Sandoval to tell me what you think.

MR. ALEXANDER: I feel the government can't play both sides of the street and say, "Look, before we called you into the grand jury room, we didn't think you did anything wrong, but after you left the grand jury room we decided you had done something wrong." That is what we have.

* * * *

[75] THE COURT: Well, all right. We will take that under advisement and as soon as I hear from you, Mr. Sandoval, [76] I will attempt to make a decision on all of the motions that have been filed.

In the meantime, gentlemen, thank you very much. I want to compliment the candor of Mr. Luckel and the two officers who testified in giving their testimony. I didn't see the slightest evidence of any attempt on their part to withhold anything, and I think they have

testified very frankly and very candidly about it and the facts are there, now, and I will just have to decide what they mean. Thank you, gentlemen.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 74-754

UNITED STATES, PETITIONER

v.

ROY MANDUJANO

ORDER ALLOWING CERTIORARI—Filed March 24, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

A true copy MICHAEL RODAK, JR.
Test:

Clerk of the Supreme Court of the United States

By /s/ Laurence P. Gill
Deputy
73-3353

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